

Indonesian Journal of International Law

Volume 4
Number 1 *International Humanitarian Law and
Human Rights*

Article 1

August 2021

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Recommended Citation

Juwana, Hikmahanto (2021) "Human Rights in Indonesia," *Indonesian Journal of International Law*. Vol. 4: No. 1, Article 1.

DOI: 10.17304/ijil.vol4.1.131

Available at: <https://scholarhub.ui.ac.id/ijil/vol4/iss1/1>

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Human Rights in Indonesia*

Hikmahanto Juwana*

Indonesia merupakan Negara peserta dari perjanjian internasional di bidang Hak Asasi Manusia. Indonesia telah mengemukakan permasalahan HAM dari Konstitusi-nya walaupun pada awalnya, permasalahan HAM bukanlah permasalahan yang menjadi perhatian utama. Aspek lain yang memiliki peranan penting terhadap perlindungan HAM selain hukum materil adalah lembaga, baik lembaga pemerintah maupun swadaya masyarakat, yang berurusan dengan permasalahan HAM. Komisi Nasional HAM (KOMNASHAM) merupakan lembaga pemerintah pertama yang didirikan untuk secara khusus menangani permasalahan HAM.

I. Introduction

Since its inception as a state in 1945,¹ Indonesia has expressed the issue of human rights in formal language in its constitution. At the time the Constitution was drafted, however, human rights were not the centre of attention. The Founding Fathers were more concerned with the fundamental issues of building a

*This writing has been published in "Human Rights in Asia; A Comparative Legal Study of Twelve Asian Jurisdictions, France and USA", Edited: Randall Peerenboom, Carole J. Petersen and Albert H.Y Chen (Routledge 2 Park Square, Milton Park, RN), 2006, hal. 364-383.

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¹ Formally Indonesia became independent from the Netherlands in 1949.

state, such as determining the ideology of the state and the form of government. If human rights were discussed intensively it was with respect to the right to self-determination of the Indonesian people.² Nevertheless, some human rights provisions were drafted. The provisions provide for equality before the law, freedom of association and expression, freedom to choose a religion, right to education, cultural protection, economic rights and right to social security.³

In 1949 and 1950, Indonesia introduced two new constitutions consecutively. Those two constitutions contain detailed human rights provisions, adopting the rights and freedoms under the United Nations Universal Declaration of Human Rights as their human rights provisions. In 1959, the 1950 constitution was amended when the government issued a decree to reintroduce the constitution adopted in 1945. The 1945 constitution survived without any amendment until 1999. From October 1999 until 2002 the Constitution was amended four times. The most significant of these amendments from a human rights perspective was the second amendment made in 2000, which provides detailed human rights, in addition to duties.

Indonesia is a party to major international human rights instruments. These include the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Political Rights of Women, and the International Convention against Apartheid in Sports. It is also a party to various ILO conventions, such as the ILO

² The right to self determination is stated in the preamble of the Constitution which provides as follows, "With independence being the right of every nation, colonialism must be eliminated from the face of the earth as it is contrary to the dictates of human nature and justice."

³ These seven articles under the Soeharto government were interpreted such a way to include various other human rights.

Convention concerning Minimum Age for Admission to Employment, and the ILO Convention concerning Discrimination in Respect of Employment and Occupation..

In addition, Indonesia has signed some optional protocols to the major conventions, such as the Optional Protocol to the Convention on the Elimination of All Forms of the Discrimination against Women, and the Optional Protocol to the Convention on the Rights of the Child. Currently Indonesia is preparing to ratify the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights.

Apart from the substantive law dealing with human rights, an important aspect of human rights promotion and protection is the existence of institutions to protect and enforce basic rights. In Indonesia, there are both government and private institutions dealing with human rights. The National Commission of Human Rights was the first government institution established to deal exclusively with human rights. The commission was highly regarded during the Soeharto Government and its recommendations influenced government's policies. Ironically, in recent times, as the government has become more democratic, recommendations from the Commission have not been taken seriously. There are several reasons for this. First, the government is poor at following up recommendations. Second, the commission does not have strong enforcement power. Third, the commission has to compete with many non-governmental organizations (NGOs) who demanded various issues for the protection of human rights.

Within the government there are several ministries, sections or desks, which deal with human rights. The institutions include the defunct Ministry of Human Rights which has been restructured and placed within the Ministry of Human Rights which has been restructured and placed within the Ministry of Justice. It is regrettable; however, that under a more democratic government and with a sound legal basis, the many government institutions dealing with human rights have failed to improve human rights practices in Indonesia. The main cause of this failure is the lack of coordination

among the relevant institutions. Each institution has its own sectoral ego in dealing with human rights.

Before 1998 there were only a handful of human rights NGOs, but recently, the number of human rights NGOs has grown considerably. The NGOs include the Commission for Disappearances of Persons and Victims of Violence (Kontras),⁴ *Imparsial*,⁵ *Lembaga Studi dan Advokasi Hak Asasi Manusia* (Institute for Human Rights Studies and Advocacies) which better known as ELSAM,⁶ and *Perhimpunan Bantuan Hukum Indonesia* or PBHI.⁷ In addition, there are many centers for human rights attached to universities. One of the leading human rights institutions is the Legal Aid Institute which was founded in 1970s and has been very critical of human rights abuses perpetrated by the government or the military.

Unfortunately, the significant improvement in the substantive law and the growing number of institutions has not resulted in the betterment of human rights. Violations of human rights continue to take place. There are six main reasons for the gap. First, the legal framework to promote human rights was passed for the wrong reasons: most of these laws were passed only in response to international pressure, NGOs pressure, or even for the purpose of holding onto power. There has not yet been any genuine attempt to improve human rights conditions

Second, many substantive laws were drafted or international instruments ratified without making a good feasibility study of the

⁴ Kontras maintains website at the following address <http://www.desaparecidos.org/kontras/>

⁵ Imparsial maintains website at the following address <http://www.imparsial.org/>

⁶ Elsam maintains website at the following address <http://www.elsam.or.id/>

⁷ PBHI maintains website at the following address <http://www.pbhi.or.id/>

supporting infrastructure for effective implementation. Third, the leniency extended by law enforcement agencies to human rights violators results in little incentive for compliance. In addition, some provisions in the legislation are difficult to enforce since they are the result of political compromises.

Fourth, the abrupt introduction of a substantive law creates problems at the enforcement stage as it involves changes in the legal culture and mindset of the general public. In addition, these laws have not been adequately publicized throughout Indonesia. Fifth, the international instruments ratified by Indonesia have not been translated into domestic obligations. For example, the domestic laws that protect laborers have remained unchanged even though a number of international treaties have been ratified to ensure their protection

Sixth, national legislations and policies are passed even though they contradict international treaties that have been ratified. For example, caning in open places has been introduced in Aceh province irrespective of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. National legislation that discriminates against Indonesian Chinese⁸ still exists even though the Convention on the Elimination of All Forms of Racial Discrimination has been ratified.

⁸ The Indonesian Chinese are discriminated against by the state since the time their birth certificates are issued with a mandatory stamp denoting their ethnicity. They are forced to prove their citizenship at many stages throughout their lives. They also have to provide additional certification, and pay higher fees, for identification cards, passports and other legal documents. *See*: "Chinese-Indonesians continue to suffer from discrimination," *The Jakarta Post*, February 18, 2002, is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20020218.A07> (last visited December 23, 2003). In 2002 it was reported that Hendrawan top shuttler who saved the country in the Thomas Cup championship had to struggle to get his citizenship certificate before heading to China for badminton tournament. *See*: "Chinese-Indonesians still discriminated against," *The Jakarta Post*, May 21, 2002 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20020521.@03> (last visited December 23, 2003).

Looking at Indonesia as a phenomenon, one has to say it is a country undergoing a transition. In a transition period one has to expect that improvement in the legal framework and institutions does not necessary result in the betterment of human rights.

II. Derogation of Civil and Political Rights

Indonesia currently has to deal with separatist movements from three minority groups claiming the right of self-determination. The first group is the Free Aceh Movement (*Gerakan Aceh Merdeka*, or GAM) in Aceh province, which struggles for Aceh independence. The second group is the Free Papua Movement (*Organisasi Papua Merdeka*, or OPM) in the Papua province, which struggles for the independence of West Papua. Lastly, the Republic of South Maluku (*Republik Maluku Selatan*, or RMS) in the province of Maluku struggles for an independent state of South Maluku. These three groups have used arms in their struggle, notably GAM.

The current law governing states of emergency in Indonesia is the Government Regulation in Lieu of a Law (Perpu) 23 of 1959 (hereinafter referred to as the Emergency Law).⁹ Perpu 23 was later confirmed as a statute by the parliament, *Dewan Perwakilan rakyat* (DPR) in 1961. An attempt to introduce a new Emergency Law in 1999 failed amid widespread protest and has never come into force.

Under the Emergency Law, the power to declare and terminate a state of emergency in all or part of Indonesia rests with the President.¹⁰ Under Indonesian Emergency Law, the President may declare one of three levels of state emergency: First civil emergency, military emergency, and a state of war. The President established an authority referred to as the "Emergency Authority"

⁹ Law 23 of 1959, State Gazette No. 139 Year 1959.

¹⁰ Art 1 (1) and (2).

which has the main responsibility of handling the day to day government affairs during emergencies.¹¹

There are three circumstances in which the President may declare a state of emergency.¹² The first is where the security or law and order of all the territory of Indonesia are threatened by rebellion, disturbances or the effects of natural disaster, so that they cannot be overcome in the normal way by the existing apparatus. This situation comes under the control of the Civil Emergency Authority. The second situation is where the state is threatened or it is clear from specific factors that there is a threat to endanger the state. The situation is under the control of the Military Emergency Authority which has the powers of the Civil Emergency Authority as well as additional powers. Lastly, a state of emergencies may be declared where a war or danger of war arises due to a violation against the territory of Indonesia. This situation is under the control of the State of War Authority, which has further powers.

The President has the exclusive right to declare and terminate the state of emergency, and according to the Emergency Law, he need not obtain approval from other institutions. In practice, however, in particular after 1998, the president has set a precedent of consulting with the DPR prior to declaring a state of emergency. Although does not specifically provide for any judicial review of the decision to declare the state of emergency, the Supreme Court may generally review such decisions.

Various rights may be restricted during a state of emergency. The restriction on rights is carried out by the Emergency Authority through the introduction of regulations considered necessary in the interests of public order or in the

¹¹ According to the status of state of emergency, the Emergency Authority is distinguished between the Civilian Emergency Authority, the Military Emergency Authority and the War Authority.

¹² Art 1.

interests of security.¹³ The regulations may not contradict the central legislative regulations, however.¹⁴

For example, the Emergency Authority has the power to introduce regulations to restrict performances, and the printing, publication, announcement, transmission, storage, distribution, trading and posting of any kind of writings as well as paintings, negatives and pictures.¹⁵ The Emergency Authority has the power to order the police or other investigation officers on their behalf to enter or search any place, even against the will of its owner or occupant, by showing a general letter of authority or a special letter of authority.¹⁶ The Emergency authority is also entitled to order investigation or confiscation of goods presumed or likely to be used to endanger security, and to restrict, or prohibit use of such goods.¹⁷ In addition, the Authority has the power to seize or use general service goods.¹⁸

Moreover, the authority has the power to (a) scrutinise all news as well as conversations transmitted by telephone or radio, and to prohibit or disconnect the transmission of news or conversations by telephone or radio; (b) restrict or prohibit the use of codes, secret communications, secret printing, shorthand, pictures, signs as well as the use of languages other than the Indonesian language; and (c) stipulate regulations restricting or prohibiting the use of telecommunication equipment such as telephone, telegraph, radio transmitter and other equipment related

¹³ Article 10 (1)

¹⁴ Art 11 (2)

¹⁵ Art 13.

¹⁶ Art 14 (1).

¹⁷ Art 15 (1)

¹⁸ Art 16

to radio broadcasting and which may be used to communicate with the general public, and to confiscate or destroy such equipment.¹⁹

The freedom of assembly may also be restricted by the Emergency Authority. The Law provides that the Authority has the power introduce provisions that make it obligatory to apply for prior permission to hold public rallies, public meetings and processions. The permission may be granted unconditionally or with conditions attached by the Authority.²⁰ The right to enter or use buildings, residences or public spaces for a certain period of time can also be restricted.²¹ Although the Law provides that such restrictions will not apply to religious services, Koran incantations, religious and traditional ceremonies or to government meetings.²² People can also be restricted from leaving their homes²³, and the authority is entitled to search the body and dress of every person against whom they have any suspicion or to have such persons searched by the police or other investigation officers.²⁴

In a state of military emergency, the authority has the power to (a) regulate, restrict or prohibit completely by regulations, the manufacture, import and export, transportation, possession, use of and trade of firearms, ingredients for explosives, ammunition, explosives and explosive goods; (b) control postal equipment and telecommunication equipment such as telephone, telegraph, radio transmitters and other equipment relating to radio broadcasting and which can be used to communicate with the general public; (c) restrict or prohibit completely by regulation the changing of fields

¹⁹ Art 17.

²⁰ Art 18 (1)

²¹ Art 18 (2)

²² Art 18 (3)

²³ Art 19

²⁴ Art 20

and objects in those fields; (d) close, for a certain period of time, theatres, meeting places, restaurants, stalls and other places of amusement as well as factories, workshops, stores and other buildings; (e) regulate, restrict or prohibit the export and import of goods from and to a region declared to be under military emergency; (f) regulate, restrict or prohibit the circulation, distribution or transportation of goods in a region declared to be under a military emergency; and (g) regulate, restrict or prohibit land, air and water traffic as well as fishing.²⁵

The Military Emergency Authority has the power to take measures to restrict shows/performances, printing, publication, announcement, transmission, storage, distribution trading or posting of writings in any form, and paintings, negatives and pictures.²⁶

In addition, the Military Emergency Authority has the power (a) to order the retention or confiscation of all letters and other packages entrusted to the postal services or other expedition services, as well as money orders and receipts together with the amounts of money paid and collected, and to open, see, examine, destroy or change the contents and make illegible those letters or packages; and (b) scrutinise cables entrusted to the cable offices as well as retain, confiscate, destroy or change the contents, and prohibit the delivery or despatch of such cables.²⁷

A person's right to live in a region or part of a region may be restricted during a military emergency by the Military Emergency Authority, if after being investigated by the investigation officers there are sufficient reasons to consider such persons as dangerous to that region.²⁸ The Law, however, provides that such person as well as his or her dependents may be given a

²⁵ Art 25.

²⁶ Art 26.

²⁷ Art 27.

²⁸ Art 28 (1).

reasonable living allowance and also be provided with a dwelling place, maintenance, and care at the expense of the State.²⁹

The Military Emergency Authority also has the power to prohibit a person staying in that authority's region from leaving that region if the presence of such person is considered vital, either for public security or defence or for the benefit of companies that are crucial to the sustenance of the national economy.³⁰ The Military Emergency Authority shall have the power to instruct persons living in a region declared to be under military emergency to do compulsory labour for the implementation of regulations or to perform other labour in the interests of security and defence.³¹

The Central Military Emergency Authority has the power to militarise a service, company, plantation, or part of a function thereof.³² Furthermore, the Military Emergency Authority may detain and arrest a person for a maximum of twenty days. If the examination is not completed within twenty days and a prolongation of the arrest is considered necessary, the person concerned may be held for a maximum of fifty days with the approval of the Central Military Emergency Authority.³³ Each detention and arrest shall be carried out with a warrant.³⁴

In the state-of-war emergency, the powers of Emergency Authority in a state of civilian and military emergency apply. Furthermore, rights may be derogated since the War Authority has the power to (a) to summon a civilian residing within the territory of the Republic of Indonesia to work for the Armed Forces of the

²⁹ Art 28 (2)

³⁰ Art 29.

³¹ Art 30.

³² Art 31.

³³ Art 32 (3)

³⁴ Art 32 (4)

Republic of Indonesia and request their assistance and help in maintaining the security or participate in defence activities or perform military tasks which he or she is capable of doing; (b) to prevent any person from wilfully neglecting or refusing to perform the tasks which he or she has agreed to perform or which must be performed by him or her by virtue of his or her positions if according to the State of War Authority such non-performance is damaging or can be considered to be damaging to the state, to public order, or to the countries economic life, without prejudice to the possibility of the settlement of labour disputes according to the prevailing laws; in the even of such prohibitions, the company, plantation, the factory, workshops, or place where or to what purpose the work must be performed shall be clearly designated; (c) together with the abovementioned prohibition, to order the employer concerned to take measures appropriate for the interests of those working for him or her.³⁵

The use of military tribunals in a state of emergency can be divided into two periods. During the Soeharto Government, military tribunals were never used, or if they were used this was never made public. After the Soeharto Government, military tribunals have been used, particularly in the troubled Aceh province. A military officer was convicted of assault and battery of civilian detainees by the military tribunal.³⁶ Another case involved three soldiers charged with assaulting villagers during an offensive against separatist rebels in Aceh province.³⁷

The Military Authority in Aceh has on occasion derogated rights mainly to contain insurgent movement or movement that will

³⁵ Art 41

³⁶ "Indonesian military tribunal sentence officer to seven years jail," ABC News, Feb. 1, 1999 available at <http://www.abc.net.au/ra/newsarchive/1999/feb/rael-1feb1999-64.htm> (last visited March 3, 2004).

³⁷ "Indonesian soldiers jailed in Aceh," BBC News, June 9, 2003, available at <http://news.bbc.co.uk/2/low/asia-pacific/2974230.stm> (last visited March 3, 2004).

facilitate insurgency. For example, public rallies have been banned and people have been arrested for initiating public rallies.

III. Civil and political Rights

Freedom of Thought, Conscience and Religion

As a majority of Indonesia's population are Moslems, Islam has become the state orthodoxy. The state promotes Islamic views, although in a limited sense. The application of the state's Islamic views is limited to three categories; to certain field of law, to specific territories, and to matters that enable Moslems to conduct their beliefs in an orderly manner.

The first category is the promotion of Islamic views in the field of family law. Under the Judicial Power Law the court system is divided into four jurisdictions, one of which is the Religious Tribunal (*Peradilan Agama*).³⁸ The Religious Tribunal under the Religious Tribunal Law is a tribunal for Moslems. The Religious Tribunal has jurisdiction over marital disputes, inheritance disputes and Islamic charitable trust disputes. Another Law that promotes Islamic views is the Marriage Law. The Marriage Law allows polygamy and provides for it with detailed provisions.

The second category is the promotion of Islamic views in limited territory. In 2002, the government issued a law giving special autonomy to the province Aceh. Under this law, the provincial government of Aceh has the authority to implement Sharia law in areas other than family law. The Sharia law has been translated in to provincial regulations known as Qanun. Since the granting of its special autonomy, the provincial government has issued numerous Qanun, such as a regulation that women have to

³⁸ The other three tribunals are the General Tribunal (*Peradilan Umum*), the Military Tribunal (*Peradilan Militer*) and the Administrative Tribunal (*Peradilan Tata Usaha Negara*).

wear the veil (*hijab*) and a regulation that men have to observe their Friday prayer.

The third category relates to the state's role in facilitating Moslems to practice their beliefs better. The Haj pilgrimage is one example. Haj Law was issued to administer and regulate various affairs for Indonesian Moslems to do their haj. Another example is the Zakat Law. Zakat is the amount of money that every adult who is a mentally stable, free, and financially able Moslem, male or female, has to pay to support specific categories people. Based on the Zakat Law, Moslems who have paid their *zakat*, like in many Arab and Islamic countries, may receive an equivalent reduction on their tax. This may be seen as a positive differential tax policy for Moslems.

Indonesia guarantees freedom of religion which means that citizens are free to choose their religion, but they are not permitted to have no religion. Under the Soeharto government, there were five religions recognized by the state; Islam, Catholicism, Protestantism, Bali-Hinduism and Budhism. The state in those days did not recognize Confucianism as a religion. This is because under the Soeharto government, Indonesian Chinese were not allowed to use their Chinese names, Chinese script, or to promote their culture, including the practice of Confucianism. The prohibition was put in place since 1967 under a presidential instruction, because of the government's dispute with China which was believed to be behind the failed government coup in 1965.

In 2000, when Abdurrahman Wahid became President, the presidential instruction was revoked, and Confucianism was allowed to be practiced. In 2002, the government under President Megawati acknowledged the Chinese Lunar New Year as a national holiday. There are now no restrictions on the religious practices that people may conduct in Indonesia.

Under the Attorney General Law, the duties of the office of the attorney general include the duty to monitor religious belief that may endanger the community and state and also to prevent abuse of religion and blasphemy. Under the Soeharto government, the office

frequently monitored and determined that certain religious teaching has endangered the community.

Freedom of Speech

Although the Constitution guarantees free speech, this right has been interpreted differently by the administration throughout the life of the Constitution. Under the Soeharto administration, freedom of speech was curtailed. The government imposed laws and regulations which in effect limited freedom of speech by individuals and the mass media. The government used criminal law and the law prohibiting subversion against those exercising freedom of speech against the government.

Under the Habibie administration, freedom of speech improved significantly but not as a result of any intentional government policy. Rather, it was because people were not afraid of voicing their concerns even if that meant violating laws and regulations. This attitude became manifest when President Soeharto was about to resign and was one of the decisive factors leading to his resignation. The public and university students had staged continuous demonstrations, despite official attempts to clamp these down. The protests reflected a display of people power.

With this improvement of freedom of speech, the public could express freely almost anything without any anxiety, including sensitive issues such as the demand that Soeharto be tried. Protests against government policies were held and there were also protests demanding that corrupt public officials be removed. There were even calls to ban the previous ruling party, *Golongan Karya* (Golkar).³⁹

³⁹ "Students Commemorate Parliament Occupation, Call for Dissolution of Golkar," *Kompas Online*, May 19, 1999 is available at <http://www.kompas.com/kompas%2Dcetak/9905/19/english/stud.htm> (last visited September 14, 2003).

Unfortunately, some of the public demonstrations were violent, resulting in the destruction of public facilities and private property.⁴⁰ These caused public inconvenience and created resentment. Large-scale demonstrations, giving rise to face-to-face confrontations with the police and the military, resulted in casualties and deaths.⁴¹ To curb and avoid further chaotic demonstrations, the government felt it had to regulate such activities. The government passed a regulation known as the Government Regulation in Lieu of Law or *Peraturan Pemerintah Pengganti Undang-undang* (hereinafter abbreviated as “Perpu”) concerning the Freedom to Express Opinion in Public. This measure was heavily criticised by human rights activists and NGOs on two counts. First, the policy was seen as an attempt to restrict, not regulate, freedom of speech. Second, the form of regulation used was criticised as Perpu is only supposed to be issued when the nation is in a state of emergency.⁴² It was asked whether the time the Perpu was issued qualified as state of emergency. To avoid further debate, an effort was made to convert the Perpu into an appropriate regulation. For this purpose, the government was quick to obtain endorsement from the parliament or DPR. The DPR swiftly gave its endorsement that

⁴⁰ One demonstration, for example, had blocked the toll road, see: “Workers stage protest on toll road,” *The Jakarta Post*, May 26, 1999 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=19990526.L09> (last visited October 23, 2003).

⁴¹ These usually involve demonstration held by students who demanded former President Soeharto to face trial or demand that Megawati resigned as President.

⁴² The Government Regulation in Lieu of Law as a form of legislation is enacted by the President under emergency circumstances only. Under Indonesia’s legislation hierarchy, this kind of Government Regulation is one rank below of a Law or Act (*Undang-undang*). Under the Constitution it is required for the Perpu to be brought to the parliament within one year after its promulgation to be confirmed or rejected as Law.

same year and the Perpu became Law with some changes (hereinafter referred to as "the Law of Free Speech").⁴³

Initially, the police faced some difficulties in enforcing the Law of free Speech.⁴⁴ People were not willing to see restrictions imposed on their new found freedom and were not hesitant to break the law to keep this freedom. In addition, the police were reluctant to take harsh measures as they were outnumbered and afraid of being accused of violating human rights.⁴⁵ One writer noted that the standard excuse for the police when standing by and witnessing a menacing armed crowd ransack someone's property or burn somebody alive was: "We don't want to be accused of human rights abuse."⁴⁶ Furthermore, the law was not enforced strictly as it was seen as undermining government's effort to win public acceptance and support.

Under the Wahid administration, freedom of speech continued to flourish. Public and mass media could say whatever they wanted without any hesitation. However, this phenomenon had been regretted by many, and some people have express their dislike

⁴³ Law of the Republic of Indonesia, No. 9 of 1998, Law Concerning Freedom to Express Opinion before the Public, is available at http://www.dephan.go.id/hukum/keptni2/uu_9_99.htm (last visited October 23, 2003). The sharp different that can be seen is under the Perpu there are 17 articles, whilst under the Law there are 20 articles.

⁴⁴ This was irrespective of Police warning to shoot demonstrators who perform anarchy. See: "Anarchistic demonstrators can be shot," *Kompas Online*, February 18, 1999 is available at <http://www.kompas.com/kompas%2Dcetak/9902/18/english/anar.htm> (last visited September 14, 2003)

⁴⁵ The non-assertive actions by the police in those days are sometimes questioned whether they are really afraid of taking actions due to accusation of human rights violations or they intentionally do not take any action with the hope that people will see their important role in managing the holding of orderly demonstrations.

⁴⁶ Carl Chairul, "Enough of democracy and human rights!," *The Jakarta Post*, April 8, 2001 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20010408.@05> (last visited September 14, 2003).

towards the concept of having no limitations upon freedom of speech.

When Megawati took over from Wahid, the public held a negative perception on the value of human rights. The government began challenging some aspects of human rights that were considered to be practiced excessively. The police have been more assertive in clamping down on demonstrations which did not comply with the Law of Free Speech. There have been cases ranging from where individuals were arrested and charged with the holding of unlicensed demonstrations, disturbing public order, smearing or stamping on pictures of the President and Vice President to those that turned on the subject matter of demonstration deemed to be against the law, such as insulting the head of state.⁴⁷ The government warned protester not to entertain any notion dream of toppling the Megawati's legitimate government as it would confront them.⁴⁸

The excesses of press freedom have also been challenged by the government. Recently editors from the mass media have been brought to court to face criminal charges, such as in the *Rakyat Merdeka* case.⁴⁹

⁴⁷ "Two protesters jailed for insulting state leaders," *The Jakarta Post*, October 25, 2002 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20021025.A08> (last visited October 23, 2003); "Police fire warning shots, beat anti-CGI protesters," *The Jakarta Post*, January 20, 2003 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030120.@01> (last visited October 23, 2003); "Mega reacts emotionally to stomping protesters," *The Jakarta Post*, January 29, 2003 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030129.A04> (last visited October 23, 2003);

⁴⁸ "Protesters told not to think of toppling govt," *The Jakarta Post*, January 7, 2003 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030107.@02> (last visited October 23, 2003).

⁴⁹ *Rakyat Merdeka* is a daily newspaper. In one case one former editor of the newspaper is found guilty for insulting the chairman of Golkar political party who is currently serving as speaker of DPR, Akbar Tanjung. The case was brought after the paper published a caricature depicting Akbar Tanjung shirtless

Under the Habibie and Wahid administrations, freedom of the press was exercised as if there were no boundaries and laws. This freedom has been demonstrated by the increased birth of new newspapers, magazines, radios and television stations.⁵⁰ The mass media can report almost anything without any government censorship, in contrast with the situation under the Soeharto administration. However, members of the public have brought lawsuits for example, for libel, against the excesses of the press.⁵¹ Of course, from the perspective of human rights activists and journalists, the many cases against the press have been seen as a threat to freedom of the press.⁵²

and dripping with sweat trying to appeal his corruption conviction. In another case, one editor is prosecuted for insulting Megawati as Indonesia's President. This is after the newspaper runs a series of headlines concerning controversial government policies related to fuel and basic commodity price increase. One headline said the President's mouth smells like diesel.

⁵⁰ There are 289 Private Printed Media Companies, 6 (six) Television Companies including the TVRI as the Public Television, and 740 Radio Broadcast Companies during the Former-Suharto administration. But soon after the Suharto regime step down and the promulgation of the new Press Law, there are 1687 private printed media Companies, 11 private television companies and one public, and 1.100 privately run radio companies and one public radio. *Source*: "The Indonesian Press Directory 2002-2003", (Jakarta: Serikat Penerbit Surat kabar, 2003), 10-18.

⁵¹ There are two most noted lawsuits. First is the case involving Tomy Winata, a controversial businessman with powerful friends, who sued *Tempo* Weekly Magazine for US\$22 million. Such case is still ongoing and there has yet been any decision. The second case involves Texmaco and its former owner, a leading textile company in the verge of bankruptcy, who sued *Kompas* daily newspaper and *Tempo*. Texmaco and *Kompas* had reached out of court settlement even though the court had started examining the case. However, in the case of Texmaco against *Tempo* there are two cases decided. One against *Tempo* weekly magazine which resulted in the Court rejecting Texmaco's claim. The other one against *Tempo* newspaper which resulted in Court found *Tempo* guilty of libellous articles.

⁵² "Press Freedom," *The Jakarta Post*, September 12, 2003 is available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030912.E01> (last visited December 23, 2003).

Since the beginning of Soeharto government in 1966 there has been no real and strong opposition from non-ruling political parties. Opposition parties were not considered to be vital elements in a continuously critical political process and were therefore cat wick and given no chance to assume power. They served only to enhance government's claim that Indonesia was a democratic state. So the opposition was not allowed to criticize the government, the president, or the government's program. Non-ruling political parties were only symbolic, and there were few real policy differences between government and opposition parties. One of the reasons behind these circumstances is that the political elites in the Soeharto government believed in consensus. Diverse social groups were to be brought into harmony, instead of conflict. Opposition based on ideology, or social and ethnic principles had no place. The government even forced political parties and NGOs to adopt Pancasila as their principle establishment, in order to prevent conflict, and to bring about national unity and integrity.

In 1999, Indonesia had its first free and democratic general election since 1955, since then the number of political parties has grown. The major political parties who won the election, however, were not divided into ruling and opposition parties. Instead, they have formed a coalition government, making it difficult for a real opposition to exist.

Since a real opposition as found in other countries does not yet exist in Indonesia, defamation laws have never been used to harass opponents within the political parties. Opposition outside the government, however, has been growing since the mid-1980s. The opposition was referred to as 'street' opposition rather than parliamentary opposition. For example, voices of democratic opposition were heard from a group called the Petition of Fifty. The group comprising former generals, political leaders, academics, students, and others, called for greater political freedom. During this period the street opposition has been harassed with various laws, from criminal laws to anti-subversion law. As to the defamation law, it was rarely used as it was considered an ineffective tool for clamping down on the movement.

Under Indonesian law, there are limitations on the release of military and other sensitive information. Article 112 to 116 to The Criminal Code provides criminal sanction on the release of military and sensitive information. Under article 112, for example, it is stipulated that any person deliberately releasing any documents or information which, in the interest of the state, should be kept secret, or informing or rendering to foreign countries can be jailed for a maximum of seven years.⁵³ In addition, anyone found guilty of leaking secret documents, maps, plans, drawings or objects related to the country's defence and security policies can be imprisoned for a maximum of four years.⁵⁴

Nonetheless, the term 'state secret' has yet to be properly defined in the law. A state secrecy law is now being drafted, which is expected to include a definition of the term. Some people have opposed the drafting of the legislation, while others agree that it should be drafted, so long as a law on freedom of information is also be promulgated. Apart from the Criminal Code, the Law on Archives provides that state archives are government's responsibility and outside parties who possess such documents are in violation of the law and will be penalized to a maximum of 20-year jail term.⁵⁵

Hate speech is mainly stipulated in the Criminal Code. The Criminal Code provides that anyone who in public uses hate speech in relation to the government, or an ethnic group or religion can be penalized with imprisonment. To prevent potential hate speech, the Soeharto government required speeches by political leaders, cleric and many others to be examined before being delivered. The government did threaten to use the hate speech provisions to deny the freedom of expression and speech, but this has not been the case following the Soeharto Government.

⁵³ Article 112 of the Criminal Code.

⁵⁴ Article 113 (1) of the Criminal Code.

⁵⁵ Law 7 of 1971, State Gazette No. 32 Year 1971, art. 11.

Obscenity and pornography in printed and electronic media have reached an alarming level, although the Criminal Code provides criminal sanction against pornographic activities. There has been an increasing amount of publications that feature semi-pornographic pictures and stories. In addition, the black-market sales of pirated pornographic video compact disc have been growing. This has worried the public. The parliament was quick to respond and started in September 2003 to draft an anti- pornography law.⁵⁶

The draft law bans the creation, dissemination and use of pornography in printed and electronic media. It would penalize anyone who intentionally becomes a model or object of pornography. The draft does not, however, clearly define what constitutes pornography. It simply says that pornography is designed to create sexual urges by exploiting sex, indecency or eroticism.

In addition, parliament is sponsoring a bill that would ban illegal acts of pornography.⁵⁷ The bill defines acts of pornography as actions intended to show and/or to exploit sexual, indecent, and/or erotic activities. The bill restricts anyone from showing their genitals, buttocks, or breasts in public places. It also bans anyone from appearing naked or kissing on the mouth in public. It bans masturbation, lewd gestures and sex in public places. Performing in, organizing or watching sex shows or parties would become crimes under the bill. At the time of this chapter was written, none of the bills have been debated. It is uncertain when the bill will become law.

⁵⁶ "Pornography to be allowed for medication, education," *The Jakarta Post*, September 04, 2003 available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030904.A07>

⁵⁷ "Bill bans public erotic dances," *The Jakarta Post*, March 08, 2004 available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20040308.C01>.

Freedom of Assembly

Although Indonesia's Constitution guaranteed the freedom of assembly,⁵⁸ under the Soeharto Government, in reality the government imposed significant controls. Public meetings of five or more persons, as well as academic or other seminars and marches and demonstrations, had to have permits from the police and several government agencies. While obtaining such approval was usually routine, the authorities occasionally arbitrarily and inconsistently withheld permission or broke up peaceful gatherings for which no permit had been obtained.

Since the fall of Soeharto Government, the restrictions have been eased. Restrictions remain for the purpose of conducting an assembly in an orderly manner, particularly in public places. There are no longer content-based prohibitions or limitations by the police or other government authorities. This is different from the Soeharto days where authorities insisted upon scrutinizing a written speech before it was delivered in public. The Law of Free Speech provides the requirements and procedure for holding demonstrations.

There are time, place and manner restrictions for holding demonstrations in public places. Under article 9 (2) of the relevant Law, demonstrations are not allowed in the vicinity of the President's palace, religious places, military complex, hospital and so on. As to time restrictions, the Law provides that demonstrations may not be held on national holidays. The Law also provides that those participating in demonstration may not bring objects that may endanger public safety.⁵⁹ Furthermore there are procedures requiring that a permit be obtained from the police before the demonstration is held.⁶⁰ The Law stipulates sanction if an assembly

⁵⁸ Before the amendment, article 28 of the Constitution provides that, "Freedom of association and assembly, of expressing thoughts by speech and writing, and so on, shall be laid down by law," See: Original Constitution, art. 28.

⁵⁹ Law 9 of 1998, art. 9 (3).

⁶⁰ Law 9 of 1998, art. 10.

in form of demonstration has not followed the Law. The form of penalties range from the dispersal of the assembly, to imprisonment for those responsible for the assembly.⁶¹ In practice, however, there are demonstrations which are held without observing the Law, and for which no sanctions have been imposed.

Restrictions to other form of assembly, such as seminars, group discussions and academic seminars, have been greatly relaxed. Permits are no longer required, but the organizing committee has to inform the police on the activities.

Economic, Social and Cultural Rights

Indonesia is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). A number of positive rights were provided under the Constitution when the Constitution was amended for the second time. These positive rights are: the right to live, the right to establish a family and for a child to have the rights to live, grow and develop, the rights to prosper and improve; the rights to be recognized and protected before the law; the rights to work, equal opportunities in government, and to citizenship status; the rights to choose one's religion and the right of association and expression; the rights to communicate and obtain information; the rights to protection and to be free from inhuman treatment; the rights to live in physical and spiritual prosperity; the rights to receive facilitation; the rights to social security and the rights to own personal property; the rights to life and rights to be free from discriminative treatment.

In 1999 the government introduced a law exclusively dealing with human rights, the Human Rights Law.⁶² The Law has

⁶¹ Ibid, art. 15 and 17.

⁶² Law of the Republic Indonesia No.39 of 1999, Law Concerning Human Rights Court, available at http://www.asiamaya.com/undang-undang/uu_pengadilan_ham/uu_pengadilan_ham_index.htm. (last visited Oct 23,2003).

106 articles and contains various basic human rights, including positive rights. It includes detailed provisions concerning the right to life and the right not to be abducted or killed, the right to establish a family and bear children, the right to self-development, the right to justice, the right to freedom of the individual, the right to security, the right to welfare, the right to participate in the government, women's right, children's right, and the right to religious freedom.

Although the Education Law does not use the term 'free education' it provides that citizens between the age of seven and fifteen must have primary education. The responsibility for funding this compulsory primary education rests with the central and regional governments. There is no obligation under the law or regulations for the state to fund public secondary education. But nevertheless, the government does so. As for tertiary education, although there is financial support in the form of subsidies to public universities, there is no financial support for those students in need and the law does not require the state to provide such support.

Medical care in Indonesia is still lacking, despite the fact that Article 34 (3) of the constitution places an obligation on the state to provide sufficient medical and public service facilities.⁶³ The Health Law⁶⁴ does not create a right to free medical treatment, but only stipulates that the government is responsible for providing medical care throughout Indonesia evenly and within the reach of the public.⁶⁵ In addition, the government has the duty to make sure that medical services can be obtained by those who are impoverished.⁶⁶ Currently there is no national health care system funded by the government.

⁶³ Constitution, art. 34 (3).

⁶⁴ Law 23 of 1992, Sate Gazette No. 3495 Year 1992.

⁶⁵ *Ibid.*, art. 7.

⁶⁶ *Ibid.*, art. 8.

The constitution places an obligation on the state to take care of impoverished persons and abandoned children,⁶⁷ but this has yet to be implemented. This is also true of the right to social security; although the constitution provides that the state has the obligation to develop a system of social security for all people and empower the inadequate and underprivileged in society in accordance with human dignity.⁶⁸

The government has dealt with the three separatist movements differently, depending on whether they receive support from local people. In the case of GAM, which has support from the people in Aceh, the government has pursued two main policies. The first is to win back the hearts of the people in Aceh by giving the province a special autonomous status, by transferring economic resources from the central to the local government, and by giving greater respect for human rights. The second policy is to declare Aceh to be in a state of emergency and to take military action to deal with GAM.⁶⁹ In 1989, under the Soeharto Government, Aceh was declared a Military Operation Zone (DOM). President Habibie lifted the status on August 1998. The military action was re-launched in March 2003 after peace talks with GAM in Tokyo failed.

The Law providing Aceh special autonomy was passed in 2001, changing the name of Aceh to *Nanggroe Aceh Darussalam* (NAD).⁷⁰ The Law also permits Sharia law to apply and, thus, civil and criminal law will be based on the Sharia. The province has the right to form its own police force. The Sharia law, however, will be imposed on Muslims only, not on members of other religions in the province.

⁶⁷ Constitution, art. 34 (1).

⁶⁸ Constitution, art. 34 (2).

⁶⁹ Presidential Decree 28 of 2003.

⁷⁰ Law 18 of 2001, State Gazette No. 114 Year 2001

The NAD Law enables the provincial government to legislate its own law referred to as 'Qanun'. One example of a Qanun that has been enacted by the Sharia council is Qanun 11 of 2002 on the implementation of the Islamic faith (*aqidah*). This law includes the obligation to pray and to spread Islamic teaching.⁷¹ The law also requires that all Muslims practice Islamic teaching in all aspects of life. This includes the practice of Friday prayer for men. Women have to wear the veil. It also prescribes the use of Arabic as the second official language within the government.

The NAD government also imposes severe punishment on those who violate the rules of *Qanun*. For example, anyone who deliberately does not conduct the Friday prayer three times consecutively, shall be punished with up to six months in jail or three lashes in public. If a transportation company does not provide facilities for Muslims to conduct their prayers then the Sharia Court has the authority to revoke its license.⁷² A Muslim who deliberately chooses not to fast in the month of Ramadhan may be jailed for up to four months or lashed two times in public.

The institution that has the authority to supervise the implementation of Qanun in NAD is called "*Wilayahul Hisbah*".⁷³ The officer of *Wilayahul Hisbah* has the authority to warn people who violate Qanun rulings and, if necessary, report the violation to the local police in order to enforce the existing law.⁷⁴

The Court in NAD is "*Mahkamah Sharia*" at the district level and provincial level. The apex of the court is the Supreme Court in Jakarta. Following the establishment of the Sharia Court in

⁷¹ The full text document of Qanun Law No. 11 of 2002 is available at: http://www.lin.go.id/dokumen/060803O2xA0002/Qanun%20Prov%20NAD%20No%2011_2002.doc (last visited 27 April, 2004).

⁷² *Ibid.*, article 21.

⁷³ *Ibid.*, article 14.

⁷⁴ *Ibid.*, Article 15.

NAD, all religious courts in Aceh were turned into Sharia Courts. The Sharia Court however will only have jurisdiction over Moslems, however, and Non-Moslems will continue to be dealt with by the General Court.

Furthermore, the Law transfers unprecedented amounts of power and resources from the central government to the Province and gives Aceh a greater share of income from its natural resources.⁷⁵ The most important provision of the law, from an Acehnese perspective, is that 70 per cent of the revenues generated from Aceh's rich oil and gas fields will now be allocated to the province, with the remaining 30 per cent going to the central government. After an 8-year period, the province will receive 50 per cent of the revenue. The Law allows more freedom for the regional government to run its internal affairs and to re-design the local government in line with local traditions. The province, through its executives, may have direct access to foreign aid.⁷⁶

The Law maintains the central government's authority over Aceh's foreign political relations, external defence and monetary affairs, while all other responsibilities fall to the provincial government. The law provides for local electoral reform giving the people greater control over their own affairs. The governor, regents and mayors will be elected directly by the people, rather than by their local legislators. Turning now to the separatist movement in Papua, unlike Aceh, the government did not declare the province in a state of emergency. In 2001, however, the government approved a special autonomy law for Papua.⁷⁷ The Law grants the province of Papua more specific control over its resources. The Law provides that 70 per cent of oil and gas royalties to be channelled to the territory (to be reviewed after a 25-year-period), as well as 80 per cent of mining, forestry and fisheries royalties, and funds from the

⁷⁵ *Ibid.*, Article 4.

⁷⁶ Law No. 18 of 2001 Article 5.

⁷⁷ Law 21 of 2001, State Gazette No. 135 of 2001.

national General Allocation Fund - as under 'normal' autonomy, 2 per cent of the national General Allocation Fund for education and health, extra funds (of an amount not yet determined) for infrastructure.

The Law also created the Papuan People's Council which is made up of indigenous, church and women's leaders, designed to protect the customary ('*adat*') rights of indigenous Papuans. In addition, the use of the Papuan flag as a cultural symbol, not as an expression of Papua's sovereignty as an independent state, is allowed.

The government has dealt with the separatist without giving special autonomy. The Maluccas conflict arises not only from a separatist movement. But also from the religious conflict is between Muslims and Christians. The population is largely Christian, unlike that of Indonesia as a whole, which is mainly Muslim. In the past Christians and Muslims have coexisted peacefully, but in the 2002 the government declared the province of Maluccas and North Maluccas to be in a state of emergency, at the level of civil emergency.⁷⁸ The emergency status for North Maluccas was lifted on May 18, 2003.⁷⁹ After a peaceful period, on April 25, 2004 a clash occurred again. The clash occurred again when RMS activists planned to hoist RMS flag.

In Indonesia, the state has adopted some affirmative-action laws to promote minority groups or individuals; however, this does not include preferential access to education and quotas or preferential treatment on economic contracts. For example the Indonesian Chinese, who are a minority group, can celebrate the Chinese New Year ('*imlek*') which previously was prohibited.

As to political representation the state has taken such action with the passing of General Election Law of 2003. Under the Law each political party, when proposing candidates for parliament and

⁷⁸ Presidential Decree 88 of 2000.

⁷⁹ Presidential Decree 27 of 2003.

DPD seats, should take into account women's representation, at the minimum of 30 %.

Cultural practices of groups are not subsidized by the state, although many local governments have been actively promoting local cultures for tourism purposes. The display of 'Grebege'n⁸⁰ in Yogyakarta or 'Ngaben'⁸¹ in Bali is just two examples of many instances.

There are many customary laws that apply to particular cultural groups, and each cultural group may have its distinct customary laws. There are two reactions from the state when the practices of customary laws conflict with national laws. First, the state attempts to institutionalise the customary laws, for example in the area of inheritance rights, the state did not do anything to change the practices of certain cultural groups where females inherit, instead of males. Under the Minang (West Sumatra) custom, the female holds a special place because the Minang customs are based on a matrilineal system. The institutionalisation of these practices is carried out by judicial decisions and, later on, accommodated in laws and regulations. For example, the Supreme Court upheld the decision that women in Lombok, West Nusa Tenggara should be given the right to inherit according to customary law. This contradicts national law.

Different approach is taken to women in a patriarchal system, however. This is exemplified by the Batak Toba tribe. Traditionally, women in Toba do not have access to inheritance. In Toba, it is a tradition that once a woman marries, she no longer belongs to her family. In recent times, the younger generation of women have pursued claims in the national court for inheritance.

⁸⁰ Grebegan is a ceremony held by the Sultan of Yogyakarta in order to celebrate the birth of prophet Muhammad SAW.

⁸¹ Ngaben is a ceremony held by the Hindu people in Bali by burning the corpses of the relative as prescribed by their religion and culture.

V. Conclusion

Since the fall of the Soeharto administration, there has been significant improvement in Indonesia's legal framework for the protection of rights, which can be seen in many sectors. Tremendous effort has been made to abolish legislation that restricted civil and political rights. In the field of economic, social and cultural rights, improvement is also significant. In particular, cultural rights have been recognized by the state. Although this was the case in so many years, including the Soeharto administration, it had not been made public.

As a country with diverse cultural groups covering a wide area, Indonesia's human rights practice is also diverse, as it would be difficult to create a uniform practice of human rights through regulation. Improvements on human rights practice is made difficult by the fact that black letter law is not always reflected in reality, for a number of reasons. First, legislation is often enacted not to address social issues faced by the society but rather for political rhetoric, to be recognized by the international community, or to meet demands placed on Indonesia from international sources.

Second, the drafters sometimes lack understanding of the intricacies of the issues. Understanding the intricacies is important since at the implementation stage the law enforcement agencies will rely mostly on what is contained in the written provisions. Thus, inaccuracy in translating concepts and policies when incorporating them into the provisions will result in high levels of inconsistency between what is intended and what is in fact implemented.

Third, legal drafters in Indonesia tend to translate foreign legislation rather than make reference to the source countries' legislation. Translating provisions, although ensuring that legislation is in fact promulgated, neglects to take into account prevailing local conditions.

Fourth, new legislation has embedded new concepts that require society's values to change abruptly. The legislation may be seen as unfit for the local community as it does not have a good understanding of the new values.

Lastly, the conventional top-down approach in making legislation has not been the best panacea for the protection and promotion of human rights. A bottom-up approach is absolutely needed.

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